

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

REGULATIONS PERTAINING TO 39 U.S.C. § 601

Docket No. RM2020-4

**COMMENTS OF THE UNITED STATES POSTAL SERVICE
IN RESPONSE TO ORDER NO. 6047**
(January 3, 2022)

On November 24, 2021, the Commission issued Order No. 6047, a notice of proposed rulemaking regarding the Commission's rulemaking authority under 39 U.S.C. § 601(c). As Order No. 6047 makes clear, the Commission's measured approach to the proposed rules is informed by substantial comments in this proceeding and in Docket No. PI2021-2 attesting to the lack of public interest in changing the location or substance of the existing regulations relating to Section 601. The proposed rules also reflect the Commission's accurate understanding—contrary to the wishes of a distinct minority of commenters—that Congress did not delegate to the Commission the power to change the substantive scope of Section 601, let alone the letter monopoly more broadly. In these regards, the Postal Service is in full agreement with the Commission's interpretation as reflected in the proposed rules.

A few aspects of the proposed rules warrant refinement, however. For the most part, these recommendations are aimed at dispelling potential confusion about the scope of the Commission's authority, which extends only to Section 601 and not to other aspects of the Private Express Statutes or 39 C.F.R. Part 310.

note (2005). The regulations do not characterize any other aspect of 39 C.F.R. § 310.1 as a purported suspension.

The relevant statutory text supports a delimited construction of Section 601(b)(3)'s reference to 39 C.F.R. § 310.1. The phrasing of Section 601(b)(3) frames “purport” as an active verb, which implies that something about the regulations’ text must do the work of claiming to suspend Section 601. Moreover, the express claim of suspension as to 39 C.F.R. § 310.1(a)(7) is on par with the express suspensions in 39 C.F.R. §§ 320.2–.8, which Congress referenced in the same parenthetical of Section 601(b)(3). Therefore, the statutory text demonstrates that these expressly claimed suspensions are what Congress had in mind in describing “regulations of the United States Postal Service . . . that purport to permit private carriage by suspension of the operation of this section.”¹ See, e.g., *ICC v. Texas*, 479 U.S. 450, 458 (1987) (Congress is presumed to be aware of preexisting regulatory interpretation when it incorporates a term into legislation). Accordingly, despite Congress’s use of a section-level cross-reference, the plain text of Section 601(b)(3) makes clear that Congress intended only for the expressly purported suspensions in paragraph (a)(7), and not other provisions of the section that make no such claim, to enter the Commission’s regulatory purview under 39 U.S.C. § 601.

Moreover, the Section 601(b)(3) criterion provides that a covered rule must “purport to permit private carriage by suspension of the operation of this section.” Paragraph (a)(7) is the only portion of 39 C.F.R. § 310.1 that meets this standard. In

¹ Order No. 6047 offers no explanation of why any other provision of 39 C.F.R. § 310.1 would qualify as “purport[ing] to permit private carriage by suspension of the operation of [Section 601],” and it is not immediately apparent how any other such provision could qualify, let alone all of them.

most other regards, 39 C.F.R. § 310.1 purports not to permit private carriage, but to define the terms on which private carriage is prohibited. See, e.g., 39 C.F.R.

§ 310.1(a)(3) (explaining when a message is “directed to a ‘specific person or address,’” such that private carriage is prohibited); *id.* at (a)(4) (listing examples of recording methods used in messages for which private carriage is prohibited); *id.* at (d) (listing examples of “post roads” on which private carriage is prohibited). While these provisions might admit of negative inferences about circumstances in which private carriage is not prohibited, that does not rise to the level of “purport[ing] to permit private carriage by suspension of the operation of” Section 601.

Only two provisions outside of paragraph (a)(7)—subparagraphs (a)(1)(i) and (ii)—exclude certain objects from the definition of a “letter” and therefore could be said to permit private carriage. In substance, however, those two provisions merely state items that are self-evidently not letters in the first place, in terms of their unsuitability for serving as letter-type communications media. By contrast, and as acknowledged by the footnote to 39 C.F.R. § 310.1, paragraph (a)(7) consists of items that do meet the primary definition of a letter (messages recorded in tangible objects), but that are carved out for essentially policy reasons. As that footnote makes clear, paragraph (a)(7) permits private carriage “by suspension of the operation of” the otherwise-applicable postage-payment requirement in Section 601; subparagraphs (a)(1)(i) and (ii) cannot fairly be said to do the same.

The draft rule seems to imply that the Commission is entitled to exercise interpretive authority as to other definitions in 39 C.F.R. § 310.1, to the extent that they define terms used in connection with Section 601. But the same definitions bear on

claims, including, potentially, claims for unpaid postage or damages resulting from violations of the Private Express Statutes. 39 U.S.C. § 401(3), (8). The proposed rule could also be viewed as at tension with 39 C.F.R. § 310.2(b)(2), which expressly permits certain agreements and which the Commission apparently views as a purported suspension that is now codified by Section 601(b)(3). See Order No. 6047 at 21 (proposed Rule 3065.1(b)(1)); Comments of the United States Postal Service in Response to Order No. 5930, PRC Docket No. PI2021-2 (Aug. 26, 2021), at 4–5.

Second, proposed Rule 3065.2(a) and (b), as drafted, would bar the Postal Service from “issu[ing] guidance” on the letter monopoly or Section 601. This goes beyond Section 601’s grant of rulemaking authority to the Commission. Although that grant, in conjunction with the changes to Section 401(2), indicates a deprivation of the Postal Service’s former rulemaking authority regarding these matters, it in no way preempts the Postal Service’s ordinary ability to offer its views—binding or not—on any aspect of postal laws (or, indeed, any other topic). Yet the proposed rule could suggest that the Postal Service would be barred from doing so in the course of Commission proceedings, informal correspondence and discussions, litigation, or other activities in the ordinary course of business, to the extent that such views could be characterized as “guidance” on the letter monopoly. Such a unilateral handicap would be unwarranted by any statutory authority and is unlikely to be what the Commission had in mind.

The simplest method to remedy these issues would simply be to delete proposed Rule 3065.2(a) and (b) and to retitle proposed Rule 3065.2 accordingly. Indeed, subsections (a) and (b) are fundamentally unnecessary in light of subsection (c), which more succinctly and accurately conveys the scope of the Commission’s Section 601(c)

the *status quo* location and content of the longstanding regulations that Congress codified. With respect to the Commission's additional proposed rules, however, further refinement is needed to avoid misimpressions as to the limited scope of the Commission's delegated authority to regulate under Section 601.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorney:

Jacob D. Howley

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-8917
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